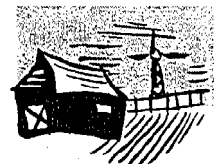


2. Water Transfers Defined

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2. Water Transfers Defined

Water transfers are a daily occurrence in California. We constantly “transfer” water that falls in the form of rain and snow via rivers, canals, and underground aquifers to urban, environmental, and agricultural water uses throughout the state. However, the term “water transfers” is generally used to mean a change in the way water is usually allocated among water users. The term encompasses a variety of water market transactions such as temporary or long term transfers, exchanges, or sale of water rights.

Every year, hundreds of thousands of acre-feet of water are transferred between willing parties. Most of these transfers consist of in-basin exchanges or sales of water among Central Valley Project (CVP) or State Water Project (SWP) contractors. For example, in 1997 nearly 288,000 acre-feet of CVP water was transferred among CVP contractors south of the Delta. Most transfers require that the water physically be moved from one district to another or from one basin to another through conveyance facilities. Since 1993, over 1.57

million acre-feet of CVP water has been transferred north and south of the Delta by contractors within the various divisions of the CVP. In addition, approximately 230,000 acre-feet of non-CVP water has been purchased and transferred by the Department of Interior’s Interim Water Acquisition Program to meet established in-stream flow purposes.

Generally, these transfers have been successful, but some transfer proposals have raised concerns regarding adverse impacts on other water users, rural community economies, and the environment. The transfers also have highlighted contradictory interpretations of state law, the lack of reliable ways to transport the transferred water across the Delta, and what is often perceived to be a complicated approval process.

The differences of opinion about water transfers demonstrate the difficulty of achieving a balance between “facilitating transfers” and providing adequate environmental and source area protection. As the CALFED Program strives to achieve its multiple objectives, there will be an expanded role for transfers as part of the Bay-Delta solution. However, before the value of water transfers as a management tool can be fully realized, several issues need to

CALFED IS NOT IN THE TRANSFER BUSINESS

The CALFED Program does not intend to enter the business of brokering transfers or banking water as a result of this policy framework, but one or more CALFED agencies may purchase water through or for the Ecosystem Restoration Program or the Environmental Water Account. The purpose of this water transfer framework is to facilitate and encourage the use of water transfers as a water management tool. The Program recommendations discussed in this document are limited to actions, policies, and processes for implementation by CALFED agencies that will affect the structure and operation of a water market.



be addressed. For purposes of this document, the issues are grouped into three major categories:

- Environmental, socioeconomic, and water resource **protections**,
- Technical, operational, and administrative **rules**, and
- **Access** to state and federal conveyance facilities (wheeling).

The CALFED Program recognizes that water transfers already are an important part of the California water management landscape and are valuable in the effort to improve water supply reliability, water use efficiency, water quality, and the aquatic ecosystem. CALFED also recognizes that water transfers can result in adverse impacts that need to be avoided or fully mitigated. CALFED actions to reduce conveyance constraints or to facilitate cross-Delta transfers could potentially exacerbate adverse impacts associated with water transfers.

Transfers can provide an effective means of moving water between users on a voluntary and compensated basis, as well as a means of providing incentives for water users to implement management practices that will improve the effectiveness of local water management. Transfers also can provide water for environmental purposes in addition to the minimum in-stream flow requirements. Regardless of the purpose, any water transfer may cause adverse impacts (socioeconomic, environmental, or water resource) in the source area of the transfer.

The annual volume of transfers always will depend on locally developed agreements and assurances. Local governments, along with a variety of public interests, will necessarily be part of the analysis and review of specific transfer proposals to ensure that their interests are protected.

2.1 WATER TRANSFER LAW AND POLICY: STATE AND FEDERAL

Both state and federal law contain provisions that authorize, acknowledge, or support water transfers. In the past several years, important policy on water transfers has been established or reaffirmed at both the state and federal levels.

WATER TRANSFERS AND EXCHANGES

Several stakeholders have suggested that the CALFED Water Transfer Program discuss both "water transfers" and "water exchanges." From CALFED's perspective the Water Transfer Program addresses all water market transactions including transfers, exchanges and sale of water rights. All of these water management activities are subject to the State Water Code and/or federal provisions (i.e., CVPIA). If the transaction involves a change in water right, it will require approval of the State Water Resources Control Board (except pre-1914 water rights). If either of the exchanging parties is a state or federal contractor, approval by the respective project operator is required. Regardless how water is made available, the re-allocation of water under right or contract from one party to be used by another constitutes a water transfer.

An easy way to remember the difference between a transfer and an exchange could be: a transfer is money for water and an exchange is water for water. In both instances, the timeline can be very short or protracted over a number of years. A permanent transfer is sometimes called a water right sale or a transfer of entitlement among state contractors or an assignment among federal contractors. CALFED is committed to moving toward standardizing the terminology as part of the larger effort to improve the function of the water market.

In his water policy speech in April 1992, then Governor Wilson reiterated the State's support for use of water transfers and the water transfer market, and described five criteria that transfers must meet:

First: Water transfers must be voluntary. And they must result in transfers that are real, not just paper, water. Above all, water rights of sellers must not be impaired.

Second: Water transfers must not harm fish and wildlife resources and their habitats.

Third: We need to assure that transfers will not cause overdraft or degradation of groundwater basins.

Fourth: Entities receiving transferred water should be required to show that they are making efficient use of existing water supplies, including carrying out urban Best Management Plans or Agricultural Water Efficiency Practices.

Fifth and finally: Water districts and agencies that hold water rights or contracts to transferred water must have a strong role in determining what is done. The impact on the fiscal integrity of the districts and on the economy of small agricultural communities in the San Joaquin Valley can't be ignored . . . any more than can the needs of high value-added, high tech industries in the Silicon Valley.

Though the current Governor (Governor Davis) has not formally announced his policy, California law does recognize transfers as reasonable and beneficial uses of water. California Water Code Section 109 states in part: "It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights ...".

There are many California Water Code provisions applicable to water transfers. Not all provisions apply to all types of water market transactions; for example, some apply only to short-term transfers, or to transfers by local agencies. A summary of certain transfer provisions is included here to illustrate how state policy on transfers is reflected in the law. A more complete text of Cal. Water Code provisions applicable to water transfers is included in Attachment B.

Cal. Water Code Sections 386, 1702, and 1706 codify what is commonly referred to as the "no injury" rule on water transfers. While the practical application of these provisions is not always clear, they do establish the principle that water transfers may not injure other legal users of water or the environment. (Cal. Water Code Section 1706 pertains to persons entitled to the use of water by virtue of an appropriation other than under the Water Commission Act—that is, a pre-1914 water right.) In addition, for transfers of water under Section 386 (as to water that is surplus to the needs of the agency or the use of which is voluntarily foregone), the Board must find that the transfer will not unreasonably affect the overall economy of the area from which the water is being transferred.

Cal. Water Code Section 484 says that temporary transfers of water that otherwise would have been consumptively used or stored in the absence of the transfer do not prejudice the transferor's future right to the use of the transferred water. This section also defines

consumptively used water as water "which has been consumed by use through evapotranspiration (ET), has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion."

Cal. Water Code Section 1011(a) provides that cessation or reduction in water use, as a result of water conservation, is a reasonable and beneficial use of the water to the extent of the reduction or cessation in use. Water conservation is defined as the use of less water to accomplish the same purpose of use permitted by the existing water right.

Cal. Water Code Section 1011(b) provides that water, or the right to the use of water, the use of which has ceased or been reduced as the result of conservation may be sold, leased, exchanged, or otherwise transferred, pursuant to any provision of law relating to water transfers.

Cal. Water Code Sections 1011(a) and (c) also provide that upon completion of any transfer of water based on conservation efforts, the right to the use of the water shall revert to the transferor as if the transfer had not been undertaken.

Cal. Water Code Section 1725 provides that a permittee or licensee may change the place of use (that is "transfer") water:

...If the transfer would only involve the amount of water that would have been consumptively used or stored by the permittee or licensee in the absence of [the transfer]; would not injure any legal user of the water; and would not unreasonably affect fish, wildlife or other in-stream beneficial uses. For purposes of this article, 'consumptively used' means the amount of water which has been consumed through use by evapotranspiration, has percolated underground, or has been otherwise removed from use in the downstream water supply as a result of direct diversion.

Cal. Water Code Section 1727 provides that the Board shall approve a temporary change under Section 1725 if it determines that the change will not injure any legal user of water and will not unreasonably affect fish, wildlife or other instream beneficial uses.

WATER TRANSFER TERMINOLOGY

The application of these statutes in the Water Code revolves around the interpretation of the "no injury" rule. There is some disagreement among stakeholders and CALFED agencies regarding the determination of injury under the Water Code. The State Water Resources Control Board in their draft guidebook for water transfers summarizes it, "You can transfer water if it is your water not somebody else's water, provided the transfer does not injure another water right holder or unreasonably affect in-stream beneficial uses."

A kind of short hand has developed around the concept of no legal injury to downstream users. Transfers do not create "new water", rather "new water" results from some action by a seller that provides water to the system that would not be available absent the action and subsequent transfer. Transfers are complicated and best evaluated on a case-by-case basis. Water made available for transfer through conservation in one situation, may harm downstream users in another situation and therefore not be transferable.

"Real water" and "paper water" are two other terms that are sometimes applied in discussions of water transfers. "Real water" is water that, if transferred, does not diminish the supply available for other beneficial uses and is not derived at the expense of another legal user. "Real water" is not necessarily "new water," but all "new water" must be "real water."

"Paper water" is water that does not create any increase in the water supply, such as water under right but not historically used. This term is often applied to transfers that are perceived to hurt legal downstream users. CALFED agencies are working to better explain how injury to other legal users is determined thus encouraging consistency among the agencies and making the rules better known to water transfer proponents.

Cal. Water Code Section 1745.04 provides that a water supplier may contract to transfer water, or store water as part of a transfer, if the water supplier has allocated to users in its service area the water available for the water year and no other user receives less than the amount provided by that allocation or is otherwise unreasonably adversely affected without that water user's consent.

Section 1745.05 provides that a water supplier may transfer water stored by the water supplier, water made available by crop shifting or fallowing, or water made available by "conservation or alternative water supply measures ...". Fallowing transfers are limited to 20% of the water that would have been applied or stored by the water supplier in the absence of a transfer contract entered into in any given hydrological year, unless the agency approves a larger percentage, after reasonable notice and a public hearing.

The federal 1992 Central Valley Project Improvement Act (CVPIA) also addressed transfers. Section 3405(a) of the CVPIA authorizes all individuals or districts who receive CVP water under water service, repayment, water rights settlement, or exchange contracts to transfer all or a portion of the CVP water they receive to any other California water user.

Both state law and federal law allow for the use of available capacity in facilities for transfers meeting all legal

LEGISLATIVE ACTIVITIES

As of the release of this document, there are several pieces of legislation pending which relate to water transfers or the use of publicly owned water conveyance facilities in connection with water transfers. Some of these are summarized below:

AB 732 (Machado) This bill would require the California Water Commission (CWC) to appoint a task force, with prescribed membership, including DWR, USBR, and the State Water Resources Control Board, to review third-party impacts of water transfers and to investigate the establishment of a water transfer clearinghouse; it requires a specified report to the Legislature and Governor by 12/1/2001, sunsets 1/1/02, and appropriates from the General Fund \$250,000 to the CWC for implementation. This bill has passed the Assembly and is now under Senate committee review.

AB 1741 (Thomson) would add Section 1018 to the water code, and would provide that water transfers between users within counties, watersheds or other areas of origin, as specified, shall be deemed not to operate to the injury of any use of water with a point of diversion that is not located within the same hydrologic area, as described, as the transferor of the water. This bill is being held in committee in the Assembly.

SB 506 (Peace) passed the Senate in 1999 and is being held in committee on the Assembly side. It would delete the requirement that the owner of a water conveyance facility determine the amount and availability of unused capacity and would establish additional conditions in Water Code section 1812 for the use of a publicly owned water conveyance facility.

SB 1923 (Costa) has passed the Senate and has been sent to the Assembly. This bill would amend sections 483, 1011 and 1736 of the water code. The amendment to Section 483 would require the Dept. of Water Resources to consult with appropriate federal agencies in carrying out a prescribed program to facilitate the exchange or transfer of water. It would also amend section 1011 to require the State Water Resources Control Board to require any person claiming the conserved water protection of Section 1011 to file periodic reports describing the extent and amount of the reduction in water use due to water conservation efforts. (Existing law authorizes but does not require the Board to require such reports.) The amendment to section 1736 would require the State Board to provide an opportunity for the Department of Water Resources to review change petitions for long term transfers.

SB 1973 (Perata) would add provisions to the Public Utilities Code authorizing any bona fide transferor of water to file a petition with the Public Utilities Commission (PUC) for an adjudication of whether the determination of fair compensation, as defined, made by a state, regional or local public agency for the use of a water conveyance facility is consistent with a specified definition and guidelines. The bill would require the PUC to remand the case to the agency for a redetermination unless the public interest would be impaired by a delay. In that case, the PUC would be authorized to determine the amount of fair compensation applicable to the proposed use of unused capacity.

SB 2139 (Johnson and Kelley) would add section 1812.5 to the Water Code, and would require the Department of Water Resources, upon written request by a public agency or retail entity that purchases water from Metropolitan Water District of Southern California (MWD) for the conveyance of non-project water through SWP facilities, to convey that water on the same terms and conditions and at the lowest price that would be applicable to MWD for the conveyance of that water for MWD's account. The bill would also require the purchasing agency to reimburse MWD for certain costs.

requirements (Cal. Water Code Section 1810 et seq. and the federal Warren Act). Cal. Water Code Section 1810 provides that the use of a conveyance facility is to be made without injuring any legal user of water and without unreasonably affecting fish, wildlife, or other in-stream beneficial uses and without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred. (Cal. Water Code Section 1814 limits the application of this statute to 70% of the unused capacity of a facility.)

Water Code Section 1813 requires that a public agency “act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water and shall support its determinations by written findings.”

In additions to the law summarized above, numerous other laws operate to protect the environment and local resources, including for example, the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), state and federal Endangered Species Acts (ESA), state and federal water quality acts, the Public Trust Doctrine, local government groundwater ordinances, and local government plans.